Supreme Court, U.S.
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No. 92-805

In the Supreme Court of the United States

OCTOBER TERM, 1992

TIMOTHY A. DEWITT, ET AL., APPELLANTS

v.

THOMAS S. FOLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION OF APPELLEE THOMAS S. FOLEY TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the Constitution or the Voting Rights Act, 42 U.S.C. 1973 *et seq.*, prohibits the election of members of the United States House of Representatives from single-member districts, as required by 2 U.S.C. 2c.

2. Whether Article I, Section 4, of the Constitution prevents a state court from assisting in the formulation of a redistricting plan for election of the State's members in the United States House of Representatives when the State's legislative processes fail to formulate such a plan in a timely manner.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Anderson v. *Celebrezze*, 460 U.S. 780 (1983)	8
Members of California Democratic Congressional Delegation v. *Eu*, 790 F. Supp. 925 (N.D. Cal. 1992)	9
New York v. *United States*, 112 S. Ct. 2408 (1992)	7
Oregon v. *Mitchell*, 400 U.S. 112 (1970)	5
Pacific States Telephone & Telegraph Company v. *Oregon*, 223 U.S. 118 (1912)	7
Powell v. *McCormack*, 395 U.S. 486 (1969)	6
Scott v. *Germano*, 381 U.S. 407 (1965)	9
Siebold, Ex parte, 100 U.S. 371 (1880)	5
Smiley v. *Holm*, 285 U.S. 355 (1932)	9, 10
United States Department of Commerce v. *Montana*, 112 S. Ct. 1415 (1992)	8
Wesberry v. *Sanders*, 376 U.S. 1 (1964)	5
Whitcomb v. *Chavis*, 403 U.S. 124 (1971)	8
Yarbrough, Ex parte, 110 U.S. 651 (1884)	5

Constitution and statutes:

U.S. Const.:	
Art. I:	
§ 2, Cl. 1 (Qualification Clause)	1, 6
§ 2, Cl. 2	2, 6
§ 4, Cl. 1 (Times, Places and Manner Clause)	2, 4, 5, 6, 7, 9, 10
Art. IV	7
§ 4 (Guaranty Clause)	7

Constitution and statutes—Continued: Page

Amend. I 3, 8
Amend. X 3, 7
Amend. XIV 3
Equal Protection Clause 8
Amend. XV 3, 8
Amend. XIX 3
Amend. XXVI 3
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:
42 U.S.C. 1973(a) 8, 9
2 U.S.C. 2c 2, 3, 4, 7, 8
28 U.S.C. 2284(a) 2

Miscellaneous:

2 *The Records of the Federal Convention of 1787* (Max Farrand ed.) 5

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Pursuant to Sup. Ct. R. 18.6, Appellee Thomas S. Foley, Speaker of the United States House of Representatives, hereby moves this Court to affirm the judgment of the three-judge district court.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-37) is not reported.

JURISDICTION

The judgment of the district court was filed on August 31, 1992. A notice of appeal was filed on September 11, 1992 (J.S. App. 38-39), and the jurisdictional statement was filed on November 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Appellants are three voters from California's seventh congressional district and one voter from Virginia. In the 1990 elections, the California appellants attempted to vote for candidates running for congressional seats other than the seventh district seat; the Virginia voter asserted a right to affiliate with voters in California by voting in congressional elections in California. Appellants filed a seventeen-count complaint in federal district court on January 29, 1992, alleging that (1) 2 U.S.C. 2c and the parallel provisions of California law that require single-member districts for congressional elections violate various clauses of the federal Constitution and the Voting Rights Act, because single-member districts unfairly deprive women and young people of proportional representation in Congress; and (2) California's redistricting plan was invalid because it was formulated by the California Supreme Court.

2. A three-judge court was convened under 28 U.S.C. 2284(a). The court granted appellees' motion to dismiss. J.S. App. 1-37. The court concluded that Congress's power under Article I, Section 4, Clause 1, to prescribe the "Times, Places and Manner of holding Elections for * * * Representatives" authorized Congress's decision to require single-member districts. The court noted that in the debates on that provision at the Constitutional Convention James Madison argued that the provision should be enacted to ensure that Congress had the power to require single-member districts. J.S. App. 11-22.

The court also rejected appellants' claim that such a rule improperly imposed a requirement for voting for representatives beyond the "Qualifications" described in Article I, Section 2, Clause 1. The court

explained that the Constitution permitted States to require "the Qualifications requisite for Electors of the most numerous branch of the State Legislature," J.S. App. 28, and concluded that because California requires voters for its Assembly to reside in the district of the seat for which they are voting, the Constitution permitted imposition of the same requirement on voters for the federal House. J.S. App. 23-30.

The court also rejected appellants' claims that single-member districts violate the First, Tenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments, explaining that "[d]istrict elections are so fundamental to the political system devised by the Framers in the Constitution that none of the amendments to the Constitution should be construed to alter it by inference." J.S. App. 35.

Finally, the court rejected appellants' claim that the redistricting plan for California's congressional seats was invalid because it was formulated by the California Supreme Court. J.S. App. 35-36. The court noted the "long history of court participation in redistricting when the elected branches do not do so." *Id.* at 36.

ARGUMENT

As the district court correctly recognized, appellants' claims are meritless. Accordingly, the Court should summarily affirm the judgment of the district court without further briefing or argument.[1]

1. Appellants' principal claim is that various provisions of the Constitution, as well as the Voting Rights Act, bar Congress's enactment of 2 U.S.C. 2c,

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[1] The Court denied appellants' motion for a stay pending appeal on October 13, 1992. 113 S. Ct. 315.

which requires single-member congressional districts.[2] None of the provisions on which appellants rely supports that claim.

a. Article I, Section 4, Clause 1, of the Constitution generally provides that the "Times, Places and Manner of holding Elections for * * * Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Contrary to appellants' argument (J.S. 34-38), that Clause fully authorizes Congress's decision to require single-member districts. First, the question whether representatives should be elected in a state-wide election or in various districts lies at the heart of the "Manner" of "holding Elections for * * * Representatives." Moreover, as the district court noted, Madison justified that Clause in the debates at the Constitutional Convention by positing the need for congressional supervision of this precise question. As Madison's notes of his statement explain:

> [T]he Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. * * * It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points

[2] Appellants also challenge the provisions of California law that require single-member districts, but because those provisions are required by 2 U.S.C. 2c, the provisions of California law must be valid if 2 U.S.C. 2c itself is valid.

> would depend on the Legislatures. and might materially affect the appointments. * * * What danger could there be in giving a controuling power to the Natl. Legislature?

2 *The Records of the Federal Convention of 1787*, at 240-241 (Max Farrand ed.) (debates of Aug. 9, 1787).

Finally, this Court's decisions repeatedly have assumed—without expressly deciding the question—that Congress properly could require its members to be elected from separate districts. See, *e.g.*, *Ex parte Siebold*, 100 U.S. 371, 384 (1880) (noting that Congress in 1842 "passed a law for the election of representatives by separate districts" and stating that "[n]o one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject [of election regulation]"); *Ex parte Yarbrough*, 110 U.S. 651, 660 (1884) (describing Congress's decision to mandate single-member districts as taken under "the powers * * * conferred" by Article I, Section 4); *Wesberry* v. *Sanders*, 376 U.S. 1, 16 (1964) (suggesting that the Clause would have permitted Congress to "lay the state off into districts"); *Oregon* v. *Mitchell*, 400 U.S. 112, 121-122 (1970) (opinion of Black, J.) (noting that "the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts").

Appellants cite no support for the counterintuitive suggestion that the Times, Places and Manner Clause does not authorize Congress to regulate this aspect of the "Manner" of electing representatives. In light of the authorities discussed above, the claim does not merit plenary review by this Court.

b. Appellants also argue (J.S. 15-34) that even if the Times, Places and Manner Clause authorizes Congress to require single-member districts, such a requirement violates Article I, Section 2, Clause 1, by imposing a "Qualificatio[n]" that is not "requisite for Electors of the most numerous Branch of the State Legislature." That claim is meritless, because the requirement that voters vote in the district in which they reside does not impose any additional qualification an individual must meet to be eligible to vote; the same individuals would be eligible to vote even if members were elected at large. All that the single-member district requirement does is specify the manner in which individuals will be able to vote: they will be able to vote only in the district in which they reside. Again, appellants cite no authority suggesting that the Qualifications Clause prevents Congress from delineating the manner in which persons who can vote in the State elections will be able to cast their vote for a representative in Congress.[3]

c. Appellants also argue (J.S. 38-42) that the requirement of single-member districting deprives the States of a republican form of government in viola-

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[3] Appellants' reliance (J.S. 24-26) on *Powell* v. *McCormack*, 395 U.S. 486 (1969), is misplaced. In that case, the Court approved of an 1807 decision of the House of Representatives rejecting a Maryland rule that required a Congressman to be a resident of a particular portion of the State. As the lower court explained, the Maryland rule in question was invalid because it exceeded the constitutional qualification that a representative "be an Inhabitant of that State in which he shall be chosen." Article I, Section 2, Clause 2; see J.S. App. 27-28. Because Clause 1 of that Section—the provision at issue here—does not state that all voters in the State must be eligible to vote for all representatives from the State, the decision in *Powell* does not support appellants in this case.

tion of the Guaranty Clause, Article IV, Section 4. They fail to address this Court's decisions holding that the Guaranty Clause does not afford a judicially enforceable right to private individuals. See, *e.g.*, *Pacific States Telephone and Telegraph Company* v. *Oregon*, 223 U.S. 118, 140-151 (1912); see also *New York* v. *United States*, 112 S. Ct. 2408, 2433 (1992) ("indulging the assumption" that "the Guarantee Clause provides a basis upon which a *State or its subdivisions* may sue to enjoin the enforcement of a federal statute" (emphasis added)). Accordingly, their reliance on the Guaranty Clause does not provide a basis for overturning 2 U.S.C. 2c.

d. Appellants also contend (J.S. 8-15) that Congress's decision to require single-member districts violates the Tenth Amendment because it infringes on aspects of state sovereignty that the States retained when the Constitution was enacted. In light of the plain terms of the Times, Places and Manner Clause discussed above, and Madison's express statement that Congress needed the power to control such determinations, it is clear that the plan of the Convention included a transfer of that authority to the national government, which was reflected in the text of the Constitution as enacted. Appellants cite no judicial decision accepting such a limited view of congressional power in this area. The question does not merit plenary review in this Court.

e. Appellants also suggest (J.S. 46-56) that single-member districts deprive them of an equal vote and thus violate the one-person, one-vote guarantee of the Fifteenth Amendment or the Equal Protection Clause. But those provisions do not require exact equality, only "a good-faith effort to achieve precise mathematical equality," *United States Department*

of Commerce v. *Montana*, 112 S. Ct. 1415, 1426 (1992). In light of the substantial obstacles to equal representation that can arise from at-large electoral systems, see, *e.g.*, *Whitcomb* v. *Chavis*, 403 U.S. 124, 141-144 (1971), and the "measure of discretion" accorded to congressional legislation in the area, see *Montana*, 112 S. Ct. at 1429, Congress's decision to require single-member districts is entirely permissible.

f. Appellants also argue (J.S. 59-65) that 2 U.S.C. 2c violates the First Amendment by preventing them from voting in elections for representatives outside their district. That claim is meritless. Although the First Amendment does impose substantial restrictions on governmental efforts to restrict campaigning or political association, see, *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), it does not grant a right to vote in an election limited to a district in which the claimant does not reside. Appellants cite no decision of any court suggesting that the First Amendment grants any such right. The decision of the district court rejecting that claim does not merit plenary review in this Court.

g. Appellants also argue (J.S. 56-59) that the requirement of single-member districts violates the Voting Rights Act, 42 U.S.C. 1973 *et seq.* But Section 2 of the Voting Rights Act regulates only the practices of States and political subdivisions, see 42 U.S.C. 1973(a); it does not regulate Acts of Congress. Accordingly, 2 U.S.C. 2c does not violate the Voting Rights Act, and provisions of California law consistent with the federal statute cannot violate the Voting Rights Act to the extent they are required by federal law.[4]

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[4] Moreover, the Voting Rights Act prevents discrimination only if it is "on account of race or color [or membership in a

2. Finally, appellants argue (J.S. 3-8) that California's redistricting plan is unconstitutional because it was prepared by the California Supreme Court, rather than the state legislature; appellants claim that this violates the requirement set forth in Article I, Section 4, Clause 1, that the "Times, Places and Manner of holding Elections * * * shall be prescribed in each State by the Legislature." But appellants ignore the fact that the California Supreme Court assumed responsibility for drafting a redistricting plan only when the legislative process deadlocked. See *Members of California Democratic Congressional Delegation* v. *Eu*, 790 F. Supp. 925, 927 (N.D. Cal. 1992) (three-judge court). As this Court has recognized, participation by the state courts in such circumstances is entirely appropriate. See, *e.g.*, *Scott* v. *Germano*, 381 U.S. 407, 409 (1965) (per curiam) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.").[5]

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language minority group]," 42 U.S.C. 1973(a). Because appellants' complaint seeks to remedy discrimination against females and young people, it does not state a claim for relief under the Act.

[5] Appellants' reliance (J.S. 4-6) on *Smiley* v. *Holm*, 285 U.S. 355 (1932), is misplaced. In that case the Court held that it was permissible for a state governor to participate in the process (by vetoing the plan adopted by the legislature), based on the theory that he was part of the law-making process established by the State. The Court explained that it "is a matter of state policy" whether a particular entity "shall have a part in the making of state laws" required to regulate elections under Article I, Section 4. 285 U.S. at 368. That rationale supports the result here, because the California Supreme

CONCLUSION

The decision of the three-judge district court should be affirmed.

Respectfully submitted.

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Court, like its Governor, forms a part of the entire law-making process of the State, even though it is not part of the legislative branch.

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